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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 493

ISAIAH H. HAMMONS, *Petitioner*

v.

THE STATE OF OREGON, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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Washington, D. C.

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Washington, D. C.

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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No.

ISAIAH H. HAMMONS, *Petitioner*

v.

THE STATE OF OREGON, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Isaiah H. Hammons, Petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above case on June 2nd, 1965.

OPINIONS BELOW

A certified copy of the opinion of the Supreme Court of the State of Oregon accompanies this petition. (Appendix P)

JURISDICTION

The judgment of the Supreme Court of the State of Oregon was entered June 2nd, 1965. A timely Motion for Reconsideration was filed (Appendix Q) and was denied by said Court by its order of June 29, 1965.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

QUESTIONS PRESENTED

I. Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court permitted petitioner's court-appointed attorney to withdraw from the pending appeals case and failed to appoint other counsel to represent appellant-defendant?

II. Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court failed to give due and adequate notice to the appellant-defendant before granting order of default?

III. Did the Court deprive the petitioner of his rights under the Constitution of the United States when it denied appellant-defendant's motions for relief from default?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Sixth Amendment and the equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States. The State Constitutional provisions and statutes referred to are only incidentally connected with the federal questions raised.

STATEMENT OF THE CASE

The petitioner herein was indicted and convicted of a felony under the laws of the State of Oregon, to-wit, receiving and concealing stolen property, in the Circuit Court of the State of Oregon for the County of Multnomah. Nathan J. Ail was appointed by the Court to represent the defendant in his trial before said Circuit Court. Petitioner was an indigent defendant. Petitioner was tried and found guilty on August 31, 1964, and was sentenced to prison for a term of three years. (Appendix A) Subsequent thereto, said Mr. Ail was appointed by said Circuit Court to represent said petitioner as an indigent appellant-defendant with respect to appealing said judgment to the Supreme Court of the State of Oregon.

On October 19, 1964, said attorney filed notice of appeal to the Supreme Court of Oregon. (Appendix C) Designation of record on appeal and transcript of testimony and proceedings were settled and filed by said attorney in the Supreme Court. (Appendices D-E)

On January 25, 1965, said attorney filed a motion for withdrawal from said appeals case for the reason that, "in said attorney's judgment and opinion, no prejudicial error appears in the defendant's trial Court record and there is therefore no substantial question to be raised by an appeal in this case." The motion also requested an order allowing appellant an extension of time in which to file appellant's brief "in the event appellant desires to obtain other counsel to prosecute this appeal." (Appendices F-G)

By order of January 26, 1965, (Appendix H) the Court extended the time for filing of appellant's brief to March 1, 1965.

On February 15, 1965, the Court by its order granted Mr. Ail's motion and relieved him as attorney for said

appellant-defendant in any further proceedings in connection with said appeal. (Appendix I)

No substitute attorney was ever appointed by the Court nor was the appellant ever notified that he had to March 1, 1965, to file his brief; nor was he ever advised by said Court as to what would occur in connection with said appeal if no brief were filed in the case.

By Notice of March 16, 1965, (Appendix J) the Clerk of the Supreme Court notified Mr. Ail as "Attorney for Appellant" and the State's attorney that the appellant was in default for failure to file his brief; that said appeal will be dismissed for want of prosecution, pursuant to the rules of said Court (Page 6), unless good cause be shown within thirty days why the appeal should be retained on the docket.

On April 16, 1965, L. B. Sandblast entered his appearance in said appeals case and filed a motion for an extension of time within which to file appellant's brief. Said motion was subsequently denied, by letter from the Clerk of the Supreme Court to Mr. Sandblast dated April 16, 1965, stating that "the Chief Justice will not sign an order at this time extending time, but it will be necessary for you to file a motion pursuant to Rule 35." (Appendices K-L)

On May 17, 1965, the District Attorney filed Motion to Dismiss Appeal for the reason that the appellant had been in default since March 1, 1965, in filing his brief and that appellant had failed to file application for relief from default. (Appendix M)

On May 25, 1965, said attorney filed Motion to Relieve Appellant of Order of Default. (Appendices N-O)

On June 2, 1965, (Appendix P) the Supreme Court by its order denied said motion. On June 28, 1965, appellant filed Motion for Reconsideration of Order Denying Relief from Order of Default. (Appendix Q)

On June 29, 1965, the Supreme Court denied appellant's motion for reconsideration. (Appendix R)

REASONS FOR GRANTING THE WRIT

This case is of importance far beyond the particular matter involved. It involves a fundamental constitutional issue as to preserving a citizen's rights in criminal prosecution. It is fundamental that a citizen is entitled to the assistance of counsel at all stages of his defense. The necessity of counsel is so vital and imperative that the failure of a court to make an effective appointment of counsel is a denial of due process within the meaning of the Constitution. Further, the Court shall not deny a citizen of his constitutional rights by arbitrarily and capriciously applying rules of the Court which would prevent a citizen from prosecuting and completing an appeal from an adverse ruling by a lower court.

I

Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court permitted petitioner's court-appointed attorney to withdraw from a pending appeals case and failed to appoint other counsel to represent said appellant-defendant?

Petitioner was an indigent defendant in a criminal case involving a felony. He was convicted and his trial attorney was appointed by the trial (Circuit) court to prosecute an appeal. Appeal was duly filed and after said attorney had prepared and submitted

his designation of record to the Supreme Court and had settled and filed transcript of testimony and proceedings, the Circuit Court permitted said attorney to withdraw from the case on said attorney's own motion because at that time he saw no substantial question for adjudication. Notwithstanding that the appellant's brief was due to be filed within a short time, the Circuit Court took no steps whatsover to substitute any attorney or effectively apprise him of need to obtain other counsel of his own choosing, leaving the appellant without representation at a critical stage of the proceedings. It is also respectfully submitted that the Court failed fully to apprise the appellant what action he should take to protect his rights and what would be the consequences in connection with his appeal if appellant did nothing further in the matter.

Counsel for the appellant-defendant in the Circuit Court filed his motion to withdraw on February 15, 1965; the Court granted said motion by its order of February 15, 1965. Therefore, the appellant-defendant was without effective assistance of counsel from February 15, 1965, until April 16, 1965, when attorney L. B. Sandblast on behalf of the appellant filed Motion for Extension of time within which to file appellant's opening brief. (Appellant's brief was due on March 1, 1965) He was advised by the Clerk of the Supreme Court on April 16, 1965, that the Chief Justice will not sign an order "at this time extending time"; (Appendices K-L) that it would be necessary to file a motion pursuant to the following Statute:

CHAPTER. 19,033, OREGON REVISED STATUTES:

"After the Supreme Court has acquired jurisdiction of the cause, the omission of a party to perform any of the acts required in connection with

an appeal, or to perform such acts within the time required, shall be cause for dismissal of the appeal. In the event of such omission, the Supreme Court on motion of the respondent or, after notice, on its own motion, may dismiss the appeal if in its judgment the omission is without reasonable excuse or it may permit the party responsible for the omission to rectify the omission, by amendment or otherwise, on such terms and within such time as may be just."

On June 2, 1965, the Supreme Court denied appellant's motion to be relieved of default and dismissed the case. On June 29, 1965, the Court denied appellant's motion for reconsideration.

The Court deprived the petitioner of due process when it permitted his court-appointed attorney to withdraw from the appeals case in a most important and critical part of the proceedings, especially in view of the fact that said attorney had already filed his statement of what errors the lower court had made at the trial. Then after placing himself on record that the Court below had made error he takes an about face and claims there were no subtstantial errors.

In *Ellis* v. *United States,* 356 U.S. 674, this Honorable Court held:

"The only statutory requirement for the allowance of an indigent's appeal is the applicant's 'good faith' * * * * *

"In the absence of some evident improper motive, the applicant's good faith is established by the presentation of any issue that is not plainly frivolous. *Foley* v. *United States,* 354 U.S. 521.

"The good-faith test must not be converted into a requirement of a preliminary showing of any particular degree of merit. Unless the issues

> raised are so frivolous that the appeal would be dismissed in the case of a non-indigent litigant * * * the request of an indigent for leave to appeal in forma pauperis must be allowed."

Speers v. *Gladden,* 390 Pac. 2d 635, involved a situation where a court-appointed attorney had filed an appeal in a criminal matter but before taking any further steps he filed a motion to withdraw from the case. The court permitted him to do so and the appellate court affirmed the action of the lower court. In its decision it cited *Ellis* v. *United States* (supra) but also held:

> "Our procedure is even more solicitous of the defendant's interests than that recognized in the Ellis case * * *. Upon appeal the court must again examine the record and assigned error. In the course of doing so it also scrutinizes the record for errors not assigned and * * * if it appears that the defendant has not received a fair trial, we will reverse and remand the case for a new trial."

There is much authority which holds that a defendant in a criminal case is deprived of due process when the court fails to provide an indigent defendant with the assistance of counsel during any critical stage of the proceedings. A landmark case is that of *Powell et al* v. *State of Alabama,* 287 U.S. 45, which holds:

> "* * * the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment."

From an examination of the records herein, especially Mr. Ail's motion to withdraw and the court's order permitting said attorney to withdraw, it is evi-

dent that the Court did not examine into the situation as to the good faith of the appellant nor did the court consider whether or not the appeal was frivolous. The only conclusion that can be drawn is that the court accepted said attorney's motion at face value and granted same without any further investigation. The fact that Mr. Ail was able to prepare a list of errors which the lower court had committed is certainly evidence enough to indicate that he did not consider the filing of the appeal to be frivolous and not in good faith.

In *Gideon* v. *Wainwright,* 372 U.S. 335, this Honorable Court reconsidered and over-ruled *Betts* v. *Brady,* 316 U.S. 455, holding:

> "In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. * * * That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. * * * From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man

charged with crime has to face his accusers without a lawyer to assist him.

"* * * The judgment is reversed and the cause is remanded * * *"

The Gideon case firmly established the law that the Constitution makes no distinction between capital and noncapital cases and that a criminal defendant's rights and guarantees under the Constitution is made applicable to the States.

In the present case the petitioner was an indigent defendant and unable to hire an attorney to protect his rights. That was also his situation at the time his court-appointed attorney was permitted to withdraw from the appeals case and at time the appeal was dismissed. The fact that the petitioner was able later to obtain counsel of his own choice should have no bearing in the matter. The harm had already been done.

II

Did the Court deprive the petitioner of his rights under the Constitution of the United States when said Court failed to give due and adequate notice to appellant-defendant before granting order of default?

On January 26, 1965, the Supreme Court extended time for filing appellant's brief to and including March 1, 1965. At that time the petitioner was still being represented by attorney Ail. While the record does not disclose to whom said order was sent, it can be presumed that Mr. Ail was the sole recipient thereof. (Appendix H) The record further discloses that the notice of dismissal of appeal of March 16, 1965, from the Clerk of the Supreme Court was sent only to Mr. Ail, who had previously withdrawn from the case and therefore had no further connection or interest therein,

and to the State's attorney. (Appendix J) No copy of said notice was sent to the petitioner, who was without legal representation at the time.

The term "due process of law" is synonymous with "the law of the land," its essential elements are notice and an opportunity to be heard and to defend in an orderly procedure adapted to the nature of the case, and it means a law which hears before it condemns, which proceeds on inquiry, and which renders judgments only after trial. Included within this requisite is an opportunity to be heard, and reasonable opportunity to prepare for a hearing, which, of course, encompasses reasonable notice of any action which the court contemplates in the proceeding.

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the action of the court and to afford them an opportunity to appear and present their objections or request for relief. *Roller* v. *Holley,* 176 U.S. 398; *Priest* v. *Las Vegas,* 232 U.S. 604; *Grannis* v. *Ordean,* 234 U.S. 385; *Milliken* v. *Meyer,* 311 U.S. 457.

An appellate court should not be relieved of any responsibility placed on any lower court in the matter of due process. Here the petitioner had no one else to assert his rights and to take such steps as would protect him from the contemplated action of the Supreme Court. He was unaware of the significance of the Court's order. The Court therefore deprived the petitioner of due process when it failed to give him timely notice and to advise him fully as to the significance of the order of the Court.

III

Did the Court deprive the petitioner of his rights under the Constitution of the United States when it denied appellant-defendant's motions for relief from default?

On May 25, 1965, the appellant-defendant through his new counsel, L. B. Sandblast, filed motion to relieve appellant or order of default (Appendices N-O) in which he stated that, among other things, the appellant was not given notice of the time limit within which to file his brief; that no substitution of attorney was made in this appeals case. On June 2, 1965, the Court denied said motion. On June 28, 1965, motion was filed for reconsideration. That motion was denied by the Court on June 29, 1965.

The Court under Chapter 19,033 hereinbefore set forth (Page 6) in its discretion "may permit the party responsible for the omission to rectify the omission, by amendment or otherwise, on such terms and within such time as may be just."

Under the circumstances of this case, especially in view of the fact that the petitioner was without counsel and without knowledge of the action of the Court, the Supreme Court should have held that the appellant's omission was with reasonable excuse. Therefore, the Court's action in permitting the default to stand and dismissing the appeal was an abuse of its discretion and arbitrary and capricious, and in violation of the petitioner's constitutional rights.

CONCLUSION

For the reasons discussed above, petitioner submits that a writ of certiorari should issue to review the decision of the court below.

Respectfully submitted,

MAURICE A. GUERVITZ
1010 Vermont Avenue, N. W.
Washington, D. C.

MILTON HELLER
Washington Building,
Washington, D. C.

Attorneys for Petitioner

Date: August 23rd, 1965

APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MULTNOMAH

No. C.—43272

STATE OF OREGON, *Plaintiff*,

v.

ISAIAH H. HAMMONS, *Defendant*.

Judgment and Sentence

On this 31st day of August, 1964, this case came before the court, the State of Oregon appearing by WARNER W. GREGG, Deputy District Attorney, and the above-named defendant appearing in person and with his attorney NATHAN J. AIL.

IT IS ADJUDGED that the said defendant has been convicted on his plea of Not Guilty and verdict of GUILTY of the offense of RECEIVING AND CONCEALING STOLEN PROPERTY.

This being the time for imposition of sentence, and no reason appearing to the court why sentence should not be pronounced at this time,

IT IS ORDERED AND ADJUDGED that said defendant be imprisoned in the Oregon State penitentiary for an indeterminate period of time, the maximum term of which shall be and hereby is fixed at Three (3) Years.

FURTHER ORDERED that said defendant be forthwith taken into custody and that his bond herein be exonerated.

FURTHER ORDERED that the amount of bond on appeal herein be fixed in the sum of $5,000.00.

ALAN F. DAVIS
Judge

APPENDIX B

Order Allowing Attorney's Fees

It appearing to the Court that the above-named defendant, ISAIAH H. HAMMONS was tried and found guilty of the crime of RECEIVING AND CONCEALING STOLEN PROPERTY under the laws of the State of Oregon, that the said defendant at said time was without funds and unable to retain his own counsel and that said defendant did request the Court to appoint suitable counsel to represent him; on appeal to the Supreme Court;

And it further appearing that Nathan J. Ail was so appointed by the Court and that thereafter the said Nathan J. Ail was retired as counsel for said defendant; and the Court being fully advised.

IT IS NOW THEREFORE ORDERED that in accordance with ORS 138.440 the said Nathan J. Ail be allowed the sum of $100.00 for his services in representing the above-named defendant, and the Clerk of the Court is hereby directed to issue a warrant upon the Treasurer of Multnomah County in favor of said Nathan J. Ail in said sum, in payment therefor.

Dated this 3 day of June, 1965

ALAN F. DAVIS
Judge

APPENDIX C

Notice of Appeal

TO: SI COHN, Clerk of the Circuit Court of the State of Oregon for the County of Multnomah

TO: GEORGE A. VAN HOOMISSEN, District Attorney for Multnomah County, State of Oregon

TAKE NOTICE, That the defendant, ISAIAH H. HAMMONS, in the above entitled cause, acting by and through Nathan J. Ail, his attorney, does hereby appeal to the Supreme Court

of the State of Oregon from the final judgment, and the whole thereof, made and entered in the above entitled cause on August 31, 1964.

DATED this 19th day of October, 1964.

NATHAN J. AIL
Attorney for Defendant

APPENDIX D

Defendant-Appellant Designation of Record on Appeal

Defendant-Appellant, Isaiah H. Hammons, hereby designates as the record on appeal in the above entitled cause the entire trial Court file, together with the Transcript of Testimony taken before the Trial Judge, Honorable Alan F. Davis, including hearing on Motion to Suppress Evidence and all the instructions given and requested.

Defendant-Appellant herein desires that the originals, or copies of the exhibits in the above entitled cause designated below shall be transmitted to the reviewing Court to which this appeal is being taken as part of the record on appeal. Said exhibits are as follows:

1. Complaint H-6840
2. Transcript of Judgment, Twila Eileen Brockell
3. Transcript of Judgment, Isaiah H. Hammons
4. Inventory of Articles, dated 2/15/64
5. List of Property, dated 2/14/64
6. A Pawn Slip.
7. Letter

Dated at Portland, Oregon this 4th day of December, 1964.

NATHAN J. AIL
Attorney for
Defendant-Appellant

APPENDIX E

Order Settling Transcript

On the application of Nathan J. Ail, attorney for defendant,

IT IS ORDERED that the transcript of testimony and proceedings in this case is hereby settled and approved as filed.

Dated this 29 day of December, 1964.

ALAN F. DAVIS
Judge

APPENDIX F

Motion for Withdrawal of Attorney

Comes now Nathan J. Ail, attorney for Defendant-Appellant herein and respectfully moves the Court for an Order permitting said attorney to withdraw as attorney for the Defendant-Appellant for the reason that, in said attorney's judgment and opinion, no prejudicial error appears in the defendant's trial Court record and there is therefor no substantial question to be raised by an appeal in this case.

NATHAN J. AIL
Attorney for
Defendant-Appellant

This Motion is based upon the affidavit of Nathan J. Ail, which is attached hereto, marked Exhibit "A" and incorporated herein.

NATHAN J. AIL
Attorney for
Defendant-Appellant

APPENDIX G

Affidavit

STATE OF OREGON
COUNTY OF MULTNOMAH } ss.

I, Nathan J. Ail, being first duly sworn, do hereby depose and say:

That I am the attorney appointed by the Honorable Alan F. Davis, Judge of Department No. 4, Multnomah County Circuit Court, to represent Isaiah H. Hammons, an indigent, with respect to the above captioned appeal to the Supreme Court of the State of Oregon; that at the time of filing the appeal in this case, it was my opinion that the trial Court had committed prejudicial error by reason of its failure to suppress certain evidence which Defendant-Appellant had contended had been obtained through unlawful search and seizure; that I have spent a considerable number of hours researching the law on this question for the State of Oregon, the several states, and the United States, and have come to the conclusion that the trial Court did not commit any error in connection with such matter; that, furthermore, I have carefully scrutinized the transcript of trial in this case for prejudicial error, and, in my opinion, it does not appear that the trial Court committed any prejudicial error.

NATHAN J. AIL
Attorney for
Defendant-Appellant

Subscribed and sworn to before me this 11th day of February, 1965.

HARRY E. KREBLEHAU
Notary Public for Oregon

My Commission Expires: 11/20/68

APPENDIX H

Order Extending Time To File Brief

It is hereby ordered that the time in which to serve and file APPELLANT'S BRIEF in the above entitled cause be and the same is extended to and including March 1, 1965 pursuant to the foregoing application.

Dated: Jan. 26, 1965

WM. M. MCALLISTER
Chief Justice

APPENDIX I

Order

The above-entitled matter came on for hearing on the motion of counsel for defendant for withdrawal of attorney, the State of Oregon appearing by Lewis B. Hampton, Deputy District Attorney, and the defendant appearing in person and with his attorney, Nathan J. Ail, and the court being fully advised,

IT IS HEREBY ORDERED AND ADJUDGED that Nathan J. Ail be and he hereby is relieved as counsel for said defendant in any further proceedings herein on the appeal.

Dated this 15th day of February, 1965.

ALAN F. DAVIS
Judge

APPENDIX J

Notice

To:

Mr. Nathan J. Ail, Attorney for Appellant

Mr. George VanHoomissen, Attorney for Respondent

It appearing from the records and files in this Court that appellant is now in default for failure to file appellant's brief

You are hereby notified that the above entitled appeal will be dismissed for want of prosecution, pursuant to Rule 33, unless good cause be shown within 30 days from this date why the appeal should be retained on the docket.

Dated this 16th day of March, 1965.

F. M. SERCOMBE
Clerk of the Supreme Court

APPENDIX K

Motion for Extension of Time To File Appellant's Brief

Comes now the defendant by and through his attorney, L. B. Sandblast, and respectfully moves the above entitled court for an extension of time within which to prepare, serve and file appellant's opening brief and shows that the attorney previously representing appellant was relieved by the circuit Court without notifying the appellant or providing substitution of attorney to prosecute appellant's appeal and on the further ground that failure of the previous attorney to prosecute the appeal has deprived appellant of his constitutional rights and thereby preventing the appellant from adequately pursuing his rights to a final decision and receive the benefits of an accused in a criminal case, and the appellant contends that the trial court made errors of law on rulings on objections during

the trial which should be reviewed upon appeal in order to give the appellant due process of law, and further represents that it is necessary that an extension of time for at least thirty days be granted to prepare appellant's Brief for service and filing.

/sd/ L. B. SANDBLAST
Attorney for
Defendant-Appellant

APPENDIX L.

STATE OF OREGON
SUPREME COURT

Salem 97310

April 16, 1965

Mr. L. B. Sandblast
Attorney at Law
2233 N. E. 15th Avenue
Portland, Oregon 97212

Re: State v. Isaiah Hammons

Dear Mr. Sandblast:

When defendant's previous attorney, Mr. Nathan Ail, requested the circuit court to relieve him as attorney, he also procured from this Court an order extending time to March 1 for filing the appellant's brief. This was in order that there would be no default. However, no brief was ever filed and the matter has been in default since March 1. Therefore, the Chief Justice will not sign an order at this time extending time, but it will be necessary for you to file a motion pursuant to Rule 35, requesting the relief from default and for time. Since these matters must be passed upon by the entire Court, your motion or a supporting affidavit should give a full explanation as to the situation. In that connection, it is our understanding that the defendant has disappeared and his whereabouts are unknown. If he has now been located and has retained

you, please so advise. It is assumed that you have not been appointed by the circuit court and that the county is not responsible for payment of any expenses or fees in connection with this appeal.

Very truly yours,

F. M. SERCOMBE
Clerk

FMS:c

cc: Mr. George VanHoomissen
Portland

APPENDIX M

Motion To Dismiss Appeal

Comes now the respondent by and through George Van Hoomissen, District Attorney for Multnomah County, Oregon, by Harold J. Blank, Deputy District Attorney, and respectfully moves the Court for an order dismissing the appeal in the above-entitled case on the grounds and for the reason:

(1) That the appellant has been in default since March 1, 1965;

(2) That appellant has failed to file application for relief from default, and

(3) That on the 16th day of April, 1965, the Clerk of the Supreme Court of the State of Oregon notified attorney L. B. Sandblast of said default and of the necessity of filing application for relief from default.

GEORGE VAN HOOMISSEN
District Attorney for
Multnomah County, Oregon

By HAROLD J. BLANK
Harold J. Blank
Deputy District Attorney
Of Attorneys for
Plaintiff-Respondent

APPENDIX N

Motion To Relieve Appellant of Order of Default

Comes now the appellant herein by his attorney, L. B. Sandblast, and respectfully moves this Court for an order Relieving the Appellant of the Default Order made by this Court on March 1, 1965, in this matter.

In support of this motion there is annexed hereto an affidavit made by L. B. Sandblast, appellant's attorney and which is referred to as fully as if the same was set out at this place.

L. B. SANDBLAST
Attorney for Appellant

In presenting this motion the appellant inquires: (1) Was appellant accorded due process of law when neither he nor his attorney was given notice of the time limited within which to file an opening brief? If this question is answered in the negative this motion should be granted: (2) Was it the duty of the Respondent, The State of Oregon, to give due and adequate notice to the appellant and or his attorney before moving the court for an order of default? If it was, then this motion should be granted.

L. B. SANDBLAST
Attorney for Appellant

APPENDIX O

Motion To Relieve Appellant of Order of Default

STATE OF OREGON,
COUNTY OF MULTNOMAH } ss.

I, L. B. Sandblast, being first duly sworn depose and say:

The appellant was indicted and convicted of a felonious charge in the Circuit Court of the State of Oregon for the County of Multnomah; whereupon Attorney Nathan Ail,

who tried the case before the said Circuit Court, filed a Notice of Appeal to this Court. The transcript was settled. Later Mr. Ail moved the trial Court for an order to relieve him as attorney for the appellant. This motion was allowed by the Court. Some time elapsed and on March 1, 1965, this Court entered an Order of Default for want of an opening brief.

After said conviction, the appellant applied to the Allied Bonding Company for bail pending appeal. In his application the appellant appointed me as his attorney on the appeal See "Exhibit A", annexed hereto and made a part of this affidavit as fully as if set out at this place. No substitution of attorney was made at the time Mr. Ail was relieved as appellant's attorney. No notice was given to me of the withdrawal of Mr. Ail, nor was any notice given to appellant (so far as I know) of the time limit within which to file an opening brief, to the effect that unless one was filed an order of default would be made March 1, 1965.

On April 14, 1965, the Allied Bonding Company made demand upon me to act as attorney for appellant pursuant to the appointment by the appellant at the time the bond was issued. I had no knowledge of the time limit within which to file an opening brief until that day, April 14, 1965. Based upon the appointment of me as attorney for appellant I filed a Motion for Extension of time within which to file an opening brief, that date.

This affidavit is made in support of a motion to Relieve the appellant of the Default Order heretofore made by this court in the above-entitled matter.

L. B. SANDBLAST

Subscribed and sworn to before me this 23rd day of May, 1965.

RAYMOND J. SANDBLAST
Notary Public for Oregon

My Commission Expires April 14, 1967

APPENDIX P

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 1st day of MARCH 1965, WHEREUPON on this WEDNESDAY, the 2nd day of JUNE 1965, the same being the 41st judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice
William G. Perry, Associate Justce
Gordon W. Sloan, Associate Justice
Kenneth J. O'Connell, Associate Justice
Alfred T. Goodwin, Associate Justice
Arno H. Denecke, Associate Justice
Ralph M. Holman, Associate Justice, and
F. M. Sercombe, Clerk,

when the following proceedings were had:

Appeal from MULTNOMAH County

No. C-43272

STATE OF OREGON, *Respondent*

v.

ISAIAH H. HAMMONS, *Appellant*

The court having duly considered respondent's motion to dismiss the above entitled appeal to this court, and appellant's motion for relief from default, and the court being fully advised therein,

IT HEREBY IS ORDERED that respondent's motion to dismiss the above entitled appeal be and the same hereby is allowed.

IT FURTHER IS ORDERED that appellant's motion for relief from default be and the same hereby is denied.

IT FURTHER IS ORDERED that respondent have and recover of and from appellant its costs and disbursements in this court taxed at $15.00.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter an order in accordance herewith.

APPENDIX Q

Motion for Reconsideration

TO: The Honorable Justices of the Supreme Court of Oregon:

Comes now the appellant by his attorneys, L. B. Sandblast and Paul M. Long, and respectfully moves the Court for Reconsideration of its Order Denying Relief from Order of Default, on an additional ground or specification, as follows: That the trial court erred in relieving the attorney of record by allowing him to withdraw from this appeal without concurrently appointing a substitute attorney to carry this case to the Supreme Court for final conclusion and decision, particularly because the trial court had declared the appellant without funds and to be an indigent.

L. B. SANDBLAST
PAUL M. LONG
Attorneys for Appellant

In presenting this motion for Reconsideration appellant will rely on the Sixth and Fourteenth Amendments to the Constitution of the United States of America.

L. B. SANDBLAST
PAUL M. LONG
Attorneys for Appellant

APPENDIX B

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 1st day of MARCH 1965, WHEREUPON on this TUESDAY, the 29th day of JUNE 1965, the same being the 52nd judicial day of said term, there were present:

Wm. M. McAllister, Chief Justice
William C. Perry, Associate Justice
Gordon W. Sloan, Associate Justice
Kenneth J. O'Connell, Associate Justice
Alfred T. Goodwin, Associate Justice
Arno H. Denecke, Associate Justice
Ralph M. Holman, Associate Justice, and
F. M. Sercombe, Clerk,

when the following proceedings were had:

Appeal from MULTNOMAH County

STATE OF OREGON, *Respondent*

v.

ISAIAH HAMMONS, *Appellant*

The court having duly considered appellant's motion for reconsideration of dismissal, and the court being fully advised therein,

IT HEREBY IS ORDERED that said motion be and the same hereby is denied.

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No. 493

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JOHN F. DAVIS, CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1965

ISAIAH H. HAMMONS,

Petitioner,

v.

THE STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

GEORGE VAN HOOMISSEN,
District Attorney for
Multnomah County, Oregon,
GEORGE M. JOSEPH,
Deputy District Attorney,
600 County Courthouse,
Portland, Oregon, 97204,
Counsel for Respondent.

September 20, 1965.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 9-65

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In the Supreme Court
of the United States

OCTOBER TERM, 1965

No. 493

ISAIAH H. HAMMONS,

Petitioner,

v.

THE STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

The State of Oregon, respondent herein, opposes the petition of Isaiah H. Hammons for a writ of certiorari to review the judgment of the Supreme Court of the State of Oregon, entered in this case on June 2, 1965.

OPINIONS BELOW

Correct copies of the opinions of the Supreme Court of the State of Oregon accompany the petition. (Appendices P and R)

JURISDICTION

Respondent accepts petitioner's statement of the jurisdiction of this court.

QUESTION PRESENTED

Whether the Supreme Court of Oregon deprived petitioner of his rights under the Constitution of the United States when it dismissed his appeal for default in filing his brief and refused to allow a motion for relief from default.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the Constitutional provisions involved.

STATEMENT OF THE CASE

Petitioner's statement of the case is inaccurate and incomplete in several respects.

In the first place, the following appears in Appendix L of the petition: "* * * In that connection, it is our understanding that the defendant has disappeared and his whereabouts are unknown. If he has now been located and has retained you, please so advise. * * *" It does not appear that Mr. Sandblast, who purported to represent petitioner, made response to the court's direction. However, the record filed pursuant to the requirement of Rule 21 (1) refers to " 'Exhibit A', power of

attorney, executed by Isaiah H. Hammons, appellant, appointing L. B. Sandblast." This power of attorney was executed in connection with the petitioner's application for appeal bail bond. Subsequent to the execution of this alleged power of attorney the trial court appointed Mr. Nathan Ail to represent the petitioner on his appeal to the Supreme Court of Oregon on the application of the petitioner. Therefore, it would appear that Mr. Sandblast was never authorized to represent the petitioner and, perforce, the attorneys who prepared the petition are not authorized to represent the petitioner.

The full record discloses that Mr. Ail moved in the Supreme Court on January 25, 1965, for permission to withdraw as attorney and simultaneously moved for an extension of time in which the appellant's brief could be filed, in order that petitioner could secure other counsel. Appendix F of the petition is not a copy of the motion filed with the Supreme Court of Oregon, but is a copy of the motion filed in the trial court pursuant to the Supreme Court Clerk's letter of January 27, 1965, notifying Mr. Ail that he had made application to the wrong court. In fact, Mr. Ail's motion in the Supreme Court was allowed only to the extent of extending the time in which to file appellant's brief to March 1, 1965. Subsequently, Mr. Ail made application to the trial court for permission to withdraw as attorney and the order allowing him to withdraw was entered by the trial court on February 15, 1965. It is to be noted that Appendix I is an order by the trial judge, not by the Supreme Court. Therefore, it appears from the record that at the time the Supreme Court of Oregon extended the due date for

appellant's brief to March 1st, Mr. Ail was still attorney of record for petitioner and remained so until February 15, 1965, when he was permitted to withdraw by the trial court. Whether or not Mr. Ail notified his client of his withdrawal from the case does not appear in the record.

The petition, on page 3 thereof, acknowledges that Mr. Ail was appointed by the circuit court to represent the petitioner as an indigent appellant. In the absence of anything to the contrary in the record, it must be assumed that Mr. Ail performed his professional responsibility and made effort to notify the petitioner of his withdrawal from the case. ORS 138.500 reads in part as follows:

> "(1) If a defendant in a criminal action * * * wishes to appeal from an appealable adverse final order or judgment of a circuit court and if such person is without funds to employ counsel for the appeal, he may request the circuit court from which the appeal is or would be taken to appoint counsel to represent him on such appeal. The request shall be in writing and shall be made within the time during which an appeal may be taken or, if the notice of appeal has been filed, at any time thereafter. The request shall include a brief statement of the assets, liabilities and income in the previous year of such person. Upon receiving such a request, the circuit court, if it finds that petitioner or defendant is without funds to employ counsel for an appeal, shall appoint counsel to represent petitioner or defendant on the appeal. * * *"

Thus Mr. Hammons had once proceeded to have coun-

sel appointed for him and the same procedure was open to him after the withdrawal of Mr. Ail. While it is by no means clear, and respondent does not concede, that it was the responsibility of the circuit court to appoint other counsel after Mr. Ail's resignation, it is perfectly clear in the circumstances that it was not the fault of the Oregon Supreme Court that petitioner was without counsel after February 15, 1965. It should be noted that February 15, 1965, was after the original due date for appellant's brief. The extension to March 1, 1965, by the Oregon Supreme Court is a clear indication that petitioner's rights were protected at all times insofar as the Oregon Supreme Court had any responsibility at all.

On page 7 of the petition appears the statement that "* * * said attorney had already filed his statement of what errors the lower court had made at the trial." On page 9 of the petition it is said: "The fact that Mr. Ail was able to prepare a list of errors which the lower court had committed is certainly evidence enough to indicate that he did not consider the filing of the appeal to be frivilous and not in good faith." The fact is that no such "statement" or "list" appears in the record of this case nor was any such ever prepared.

On page 10 of the petition it is stated: "The record further discloses that the notice of dismissal of appeal of March 16, 1965, from the Clerk of the Supreme Court was sent only to Mr. Ail, who had previously withdrawn from the case and therefore had no further connection or interest therein, and to the state's attorney." Petitioner insists on referring to the notice of March 16,

1965, as a "notice of dismissal of appeal." It was in fact a notice of default and on its face shows that it was a notice that the appeal "will be dismissed for want of prosecution, pursuant to Rule 33, unless good cause be shown within 30 days from this date why the appeal should be retained on the docket." Attached to said notice and forming a part thereof is a certificate by the Clerk of the Supreme Court that notice was sent to Mr. Ail, the district attorney and to petitioner at the Oregon State Penitentiary, which, according to the records available to the Supreme Court, was petitioner's only known address. Further, the record contains a copy of a letter from Mr. Ail addressed to the petitioner at petitioner's last known address in Portland, Oregon, which letter was dated March 17, 1965, a date well within the 30 days expressed in the notice of March 16, 1965. It should be noted that at that time Mr. Ail was still acting to protect petitioner's interests. Further, it must be noted that respondent's motion to dismiss appeal was not filed until May 17, 1965, more than two months after the notice of default and after the time when Mr. Sandblast purportedly began to represent petitioner, as shown by Appendix K of the petition.

REASONS AGAINST GRANTING THE WRIT

I. Petitioner Was Not Discriminated Against.

Due to petitioner's inaccurate, incomplete and misleading statement of the case, it has been necessary for respondent in restating the case to present some matters argumentatively. Respondent's statement of the case

should therefore be taken to be a part of its reasons against granting the writ. A proper reading of the record shows plainly that this indigent petitioner had the assistance of counsel on appeal. He was in no way discriminated against.

Petitioner cites *Powell et al. v. State of Alabama,* 287 U.S. 45, with an implicit suggestion that the Oregon courts failed to provide petitioner with the assistance of counsel during a critical stage of the proceedings. The record, filed by petitioner, defeats this suggestion, for Mr. Ail was appointed to represent petitioner, counsel was allowed to correct an omission to comply with the appellate procedure and more than the ordinary time was allowed for the filing of the brief. As this court said in *Douglas* v. *California,* 372 U.S. 353, at 356:

> "* * * A State can, consistently with the Fourteenth Amendment, provide for differences [in the manner of handling appeals by indigents] so long as the result does not amount to a denial of due process or an 'invidious discrimination.' * * *"

Nothing in this record shows that petitioner was discriminated against in any way. On the contrary he had every protection he was entitled to.

Petitioner cites *Speers* v. *Gladden,* 237 Or. 100, 390 P.2d 635. This case is relevant on the issues presented by petitioner, for it presents a review of Oregon's method of handling indigent's appeals and shows that the method not only complies with the requirements of *Douglas,* but goes beyond. In the instant case, as in the *Speers* case, appointed counsel sought to resign for the reason that

counsel could find "no prejudicial error of record and there therefore is no substantial question to be raised by an appeal." Precisely the same factual situation is presented here. The transcript was prepared and settled. Mr. Ail, an attorney of undoubted competence, reviewed the transcript and concluded that there was no error of record upon which to base an appeal. The court in *Speers* cited *Ellis* v. *United States,* 356 U.S. 674, which involved an appeal in the federal court system. In that case this court said that if counsel seeks to withdraw and the court is satisfied that counsel has investigated the appeal thoroughly and if the court agrees with the counsel's evaluation, then the withdrawal may be allowed and *leave to appeal may be denied.*

Oregon's system is more solicitous of the defendant's interests for the reason that withdrawal of counsel has no effect upon the appeal. The indigent defendant (who has already had the benefit of counsel) may proceed on his own and the court must examine the record for assigned error and for errors not assigned. The thrust of petitioner's argument is that the court is obligated to appoint counsel for the defendant who will present the appeal regardless of its merit. *Douglas* does not demand such a result.

II. Every Reasonable Effort Was Made To Give Petitioner Notice.

The record also shows that petitioner's former counsel, the Supreme Court and the district attorney made every reasonable effort to notify the petitioner of pending dismissal of his appeal. The only reason petitioner

did not get due and proper notice of the pending dismissal was that he had fled the jurisdiction and his whereabouts were (and are) unknown. It is to be noted that Mr. Sandblast, who purported to represent the petitioner, never presented any reasons supported by the record for relief from default. In the circumstances it cannot fairly be said that the court's action in refusing to relieve petitioner of the order of default was an abuse of its discretion, arbitrary or capricious. There was no violation of the petitioner's constitutional rights.

CONCLUSION

For the reasons stated above respondent submits that a writ of certiorari should not issue to review the decision of the court below.

Respectfully submitted,

GEORGE VAN HOOMISSEN
District Attorney for
Multnomah County, Oregon
GEORGE M. JOSEPH
Deputy District Attorney
600 County Courthouse,
Portland, Oregon 97204
Counsel for Respondent

September 20, 1965.